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No.: ICC-01/04-01/06

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TRIAL CHAMBER I

Before: Judge Adrian Fulford, Presiding Judge
Judge Elizabeth Odio Benito
Judge René Blattmann

Registrar: Mr Bruno Cathala

**SITUATION IN THE DEMOCRATIC REPUBLIC OF THE CONGO
IN THE CASE OF
*THE PROSECUTOR v. THOMAS LUBANGA DYILO***

Public redacted version

Urgent

**Corrigendum to Defence Response to the “Registrar’s Observations on the
Disclosure of Evidence”**

Office of the Prosecutor

Mr Luis Moreno Ocampo

Ms Fatou Bensouda

Mr Ekkehard Withopf

Defence Team

Ms Catherine Mabilie

Mr Jean-Marie Biju-Duval

Mr Marc Desalliers

Ms Caroline Buteau

**Counsel for Victims a/0001/06 to Office of Public Counsel for Victims
a/0003/06 and a/0105/06**

Mr Luc Walley

Mr Franck Mulenda

Ms Carine Bapita Buyangandu

Ms Paolina Massidda

BACKGROUND

1. On 13 December 2007, the Registrar filed the “Registrar’s Observations on the Disclosure of Evidence”.¹ In his observations, the Registrar proposes that all information concerning the identity of witnesses whose application for participation in the protection programme (ICCPP) has been rejected should be disclosed to the Defence only 30 or 8 days before their testimony, depending on whether [REDACTED] is available.²

OBSERVATIONS

2. The Defence objects to the Registrar’s proposal, which it considers to be inconsistent with the rights of the accused and a fair and impartial trial. As the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) stated: “How can one conceive of the accused being afforded an equitable trial, adequate time for preparation of his defence, and intelligent cross-examination of the Prosecution witnesses if he does not know from where and by whom he is accused?”³
3. The Accused’s fundamental right to be informed of the identity of Prosecution witnesses cannot be restricted, even temporarily, for their protection, unless there are exceptional circumstances founded on the existence of a duly warranted and specific danger, and then only if there is no other means of providing such protection. The restriction must be lifted sufficiently in advance of the commencement of the trial so as to enable the Accused to prepare his defence.
4. The Registrar’s proposals are clearly inconsistent with these basic principles.

(A) The general rule proposed by the Registrar is inconsistent with the principle of case-by-case assessment of the danger

5. The protective measures affecting the exercise of the rights of the Defence, in particular non-disclosure of identity, can be contemplated only in exceptional circumstances and can be ordered only after a case-by-case assessment of each witness’s situation.⁴ The Chamber

¹ ICC-01/04-01/06-1082.

² [REDACTED].

³ *Prosecutor v. Blaškić*, Case No. IT-95-14-T, *Decision on the application of the Prosecutor dated 17 October 1996 requesting protective measures for victims and witnesses*, 5 November 1996, para. 41.

⁴ *Prosecutor v. Brđanin and Talić*, IT-99-36-T, *Decision on motion by Prosecution for protective measures*, 3 July 2000, paras. 10, 11 and 19; *Prosecutor v. Milošević*, Case No. IT-02-54-T, *Decision on Prosecution motion for provisional protective measures pursuant to Rule 69*, 19 February 2002, para. 17.

must ensure that temporary non-disclosure of the identity of witnesses remains an exceptional measure to be ordered only in the absence of other means of protection. The more a protective measure affects the exercise of the rights of the Defence, the greater the importance of the obligation to prove the existence of the risk alleged.⁵

6. However, in this case, the Registrar appears to be proposing that Prosecution witnesses not participating in a protection programme should automatically be afforded the protective measure of non-disclosure of their identity to the Defence.
7. At no point does the Registrar specify the assessment criteria – which are likely to be raised by the Defence – used to confirm the existence of a danger warranting non-disclosure of these witnesses' identity.
8. On the contrary, he emphasises the fact that his own assessments prompted him to deny the witnesses concerned access to a protection programme. It is paradoxical that the Registrar's denial, which indicates that he has not identified any specific risk, is considered sufficient grounds to apply the measure which is most prejudicial to the rights of the Defence: non-disclosure of identity. The Accused should not suffer the negative effects of the Registrar's denial of an application to participate in the protection programme.
9. By proposing non-disclosure of the identity of Prosecution witnesses as a general measure applied automatically to witnesses whose situation has been deemed of insufficient concern to warrant their admission into a protection programme, the Prosecutor's proposal clearly contravenes the principles set out above.

(B) In any event, the exceptional measures of non-disclosure of witnesses' identities must be lifted sufficiently in advance of the commencement of the trial to enable the Accused to prepare his defence

10. The Registrar proposes that any information concerning the identity of these witnesses not be disclosed until 30 or 8 days prior to their testimony before the Court, depending on whether [REDACTED] is available.

⁵ *Prosecutor v. Limaj et al.*, Case No. IT-03-66-T, *Decision on the first prosecution's motion for protective measures at trial*, 22 November 2004, paras. 6 and 7 and *Prosecutor v. Milošević*, Case No. IT-02-54-T, *Decision on Prosecution's motion for trial related protective measures for witnesses (Bosnia)*, 30 July 2002, para. 5; *Prosecutor v. Milošević*, Case No. IT-02-54-T, *Decision on Prosecution's motion for trial related protective measures for witnesses (Croatia)*, 30 July 2002, para. 5.

11. This proposal is inconsistent both with the applicable law and with the concrete requirements of the preparation of the defence.

– ***Applicable law***

12. Under article 67, “[the accused must] be informed promptly and in detail of the nature, cause and content of the charge[s]” brought against him and “have adequate time [...] for the preparation of the defence”.

13. Article 68 and rule 81 provide that non-disclosure of the identity of witnesses, victims and their family members may be ordered only during the period leading up to the commencement of the trial and in a manner which is not inconsistent with the rights of the Defence and a fair and impartial trial.⁶

14. It follows that the identity of witnesses must be disclosed sufficiently in advance of the commencement of the trial to enable the Accused to prepare his defence appropriately and to cross-examine Prosecution witnesses effectively. This requirement takes precedence over witness protection concerns.

15. This principle is enshrined in the Statute and case law of the International Criminal Tribunal for the former Yugoslavia.⁷ The Trial Chamber in *Blaškić* recalled that:

[T]he victims and witnesses merit protection, even from the accused, during the preliminary proceedings and continuing until a reasonable time before the start of the trial itself; from that time forth, however, the right of the accused to an equitable trial must take precedence and require that the veil of anonymity be lifted in his favour, even if the veil must continue to obstruct the view of the public and the media.⁸

⁶ Rule 81(4): “4. The Chamber dealing with the matter shall, on its own motion or at the request of the Prosecutor, the accused or any State, take the necessary steps to ensure the confidentiality of information, in accordance with articles 54, 72 and 93, and, in accordance with article 68, to protect the safety of witnesses and victims and members of their families, including by authorizing the non-disclosure of their identity prior to the commencement of the trial.” Article 68(5): “Where the disclosure of evidence or information pursuant to this Statute may lead to the grave endangerment of the security of a witness or his or her family, the Prosecutor may, for the purposes of any proceedings conducted prior to the commencement of the trial, withhold such evidence or information and instead submit a summary thereof. Such measures shall be exercised in a manner which is not prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.”

⁷ Rules of Procedure and Evidence, ICTY, IT/32/Rev. 40, 12 July 2007, rule 69 C); *Prosecutor v. Blaškić*, Case No. IT-95-14-T, *Decision on the application of the Prosecutor dated 17 October 1996 requesting protective measures for victims and witnesses*, 5 November 1996, para. 41; *Prosecutor v. Milutinović et al.*, Case No. IT-99-37-T, *Decision on prosecution’s motion for protective measures*, 17 July 2003; *Prosecutor v. Milošević*, Case No. IT-02-54-T, *Decision on Prosecution motion for provisional protective measures pursuant to Rule 69*, 19 February 2002, etc.

⁸ *Prosecutor v. Blaškić*, Case No. IT-95-14-T, *Decision on the application of the Prosecutor dated 17 October 1996 requesting protective measures for victims and witnesses*, 5 November 1996, para. 41.

16. The time limit for disclosure must be calculated on the basis of the trial commencement date, not the date on which the witness appears.⁹ The accused must be in possession of all incriminating evidence, including the identity of all witnesses, sufficiently in advance of the commencement of the trial.

– *Defence investigation requirements*

17. Non-disclosure of the identity of Prosecution witnesses prevents the Defence from properly investigating their credibility, since the measure not only conceals their identity itself, but also expunges from their statements any information which might enable them to be identified directly or indirectly.¹⁰

18. The need to have the exact identity of the Prosecution witnesses in order to investigate exonerating circumstances effectively is universally recognised;¹¹ the ICTY went as far as to note the Defence's right to disclose the identity to third parties, despite a measure prohibiting public disclosure, where disclosure is necessary to allow the Defence to investigate the witnesses concerned appropriately.¹²

⁹ See, for example: *Prosecutor v. Brđanin and Talić*, IT-99-36-T, *Decision on motion by Prosecution for protective measures*, 3 July 2000; *Prosecutor v. Milošević*, Case No. IT-02-54-T, *Decision on Prosecution motion for provisional protective measures pursuant to Rule 69*, 19 February 2002, para. 26; *Prosecutor v. Orić*, Case No. IT-03-68-T, *Decision on confidential prosecution motions for protective measures and nondisclosure*.

¹⁰ ICC-01/04-01/06-T-65-FRA, page 10, lines 15-18.

¹¹ *Prosecutor v. Brđanin and Talić*, IT-99-36-T, *Decision on motion by Prosecution for protective measures*, 3 July 2000, para. 36:

The Prosecution asked rhetorically: [E]ven if [the defence] have the name of a witness, how would this assist them preparing the defence of either of the two accused? These statements are quite unrealistic when applied to those witnesses who fall within the category of giving evidence which directly implicates the accused. There can be no assumption by counsel for the accused that these witnesses will be telling the truth. There are well documented cases where, upon a careful investigation, witnesses called by the prosecution have turned out not to have been where they say they were, or have subsequently retracted their evidence. The Appeals Chamber has placed a firm obligation upon those representing an accused person to make proper inquiries as to what evidence is available in that person's defence. Some of the prosecution witnesses are likely to be of such importance that it will be necessary for at least the final stage of the investigation into those witnesses to be done by counsel who is to appear for the accused at the trial. That is obvious to anyone with experience of criminal trials. The earlier stages can be conducted by the investigator(s) retained for the accused in the field. Many more than one person may well need to be spoken to before appropriate information becomes available.

¹² For example: *Prosecutor v. Blaškić*, Case No. IT-95-14-T, *Decision on the application of the Prosecutor dated 17 October 1996 requesting protective measures for victims and witnesses*, 5 November 1996, p.13; *Prosecutor v. Brđanin and Talić*, IT-99-36-T, *Decision on motion by prosecution for protective measures*, 3 July 2000; *Prosecutor v. Milošević*, Case No. IT-02-54-T, *Decision on Prosecution motion for provisional protective measures pursuant to Rule 69*, 19 February 2002.

(C) Time required by the Defence

19. The Defence has repeatedly argued that it requires three months before the commencement of the trial for its preparation as from the disclosure of all of the Prosecutor's evidence, including the full identity of his witnesses.¹³
20. In its decision of 9 November 2007, the Chamber granted the Defence the three months it requested for its preparation.¹⁴ Accordingly, the Chamber ordered the Prosecutor to disclose all of his evidence by 14 December 2007.
21. On 13 December, the Chamber confirmed in an oral decision the time limit of 14 December 2007, with the exception of certain information concerning witnesses referred to the Victims and Witnesses Unit, which must be disclosed by 31 January 2008.¹⁵
22. The three-month time period which the Chamber granted to the Defence for its preparation cannot be further shortened without infringing the rights of the Accused.

FOR THESE REASONS, MAY IT PLEASE TRIAL CHAMBER I:

TO TAKE INTO CONSIDERATION the observations of the Defence set out in this response.

[signed]

Ms Catherine Mabilie, Lead Counsel

Dated this 3 January 2008, at The Hague

¹³ ICC-01/04-01/06-T-52-FRA, p. 42, lines 15 *et seq.* See also ICC-01/04-01/06-960-tENG, paras. 9 *et seq.*

¹⁴ ICC-01/04-01/06-1019, para. 29.

¹⁵ ICC-01/04-01/06-T-65-FRA, page 9, lines 15-17 and 18-22.